United Nations CCPR/C/122/D/2265/2013

International Covenant on Civil and Political Rights

Distr.: General
14 May 2018

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2265/2013*, **

Communication submitted by:	Himal and Devi Sharma (represented by counsel, Philip Grant, of TRIAL: Track Impunity Always)
Alleged victims:	The authors
State party:	Nepal
Date of communication:	22 April 2013
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 11 July 2013 (not issued in document form)
Date of adoption of Views:	6 April 2018
Subject matter:	Enforced disappearance
Procedural issues:	Failure to sufficiently substantiate allegations; exhaustion of domestic remedies
Substantive issues:	Right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of person; respect for the inherent dignity of the human person; recognition as a person before the law; right not to be subjected to arbitrary or unlawful interference with one's family life; and right to an effective remedy
Articles of the Covenant:	2 (3), 6, 7, 9, 10 (1), 16 and 17
Articles of the Optional Protocol:	2; 5 (2) (b)

1. The authors of the communication are Himal Sharma and his wife Devi Sharma, nationals of Nepal born on 24 April 1969 and on 14 April 1970 respectively. They claim

* Adopted by the Committee at its 122nd session (12 March–6 April 2018).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Christof Heyns, Yuji Iwasawa, Ivana Jelić, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

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that the State party has violated Mr. Sharma's rights under articles 6, 7, 9, 10 (1) and 16 of the Covenant, read alone and in conjunction with article 2 (3) of the Covenant, and that it has violated Ms. Sharma's rights under article 7, read alone and in conjunction with article 2 (3), and article 17. The authors are represented by counsel.

The facts as submitted by the authors

2.1 In February 1996, the Communist Party of Nepal (Maoist) declared a "people's war" against the ruling classes and launched an armed rebellion against the Government that rapidly spread throughout the country, leading to a decade-long armed conflict. In view of the serious situation arising out of terrorist attacks by the Maoists, a state of emergency was declared from 26 November 2001 to 20 August 2002. During the state of emergency, the derogable rights of the Covenant were suspended, in accordance with article 4 thereof. On 26 November 2001, the Government adopted the Terrorist and Disruptive Activities (Control and Punishment) Act to grant a broad range of powers to the Royal Nepalese Army to arrest individuals on the basis of suspicion of involvement in terrorist activities and to keep them in detention for up to 90 days without charge. Serious human rights violations such as arbitrary detentions, enforced disappearances, torture and extrajudicial killings continued to plague the conflict on both sides even after the state of emergency was lifted.

2.2 In 2003 and 2004, according to the Working Group on Enforced or Involuntary Disappearances, there were more cases of enforced disappearance reported to the Working Group from Nepal than from any other country. In its 2004 report, the Working Group referred to the use of enforced disappearances as a widespread phenomenon whose perpetrators were shielded by political and legal impunity.[1] Between 2003 and 2006, the Bhairabnath Battalion barracks, located in Maharajgunj, Kathmandu, and run by the army, became the main location in the capital for the illegal detention of those suspected of affiliation with the Communist Party of Nepal (Maoist). In the barracks, detainees were forcibly disappeared, tortured or summarily killed.[2]

2.3 When the events that gave rise to this case took place, Mr. Sharma was Secretary-General of the Maoist-affiliated All Nepal National Independent Student Union (Revolutionary). He submits that he was arrested on 21 October 2003 in Kathmandu by army officers dressed as civilians. Blindfolded, and with his hands tied, he was taken to the army barracks located in Maharajgunj in a civilian jeep escorted by military vans.

2.4 On 29 October 2003, Ms. Sharma filed a writ of habeas corpus before the Supreme Court of Nepal on behalf of her husband, claiming that he had been arbitrarily detained and subjected to enforced disappearance. Later the same day, Ms. Sharma went to the District Administration Office of Kathmandu to inquire about his whereabouts. The Chief District Officer denied any involvement in the arrest of Mr. Sharma, refused to register her complaint and threatened to arrest her and her family if she took any action regarding the disappearance of her husband. On 30 October, in response to the writ of habeas corpus, the Supreme Court ordered the Nepalese public authorities to disclose all information regarding Mr. Sharma's whereabouts. On the same day, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Chair of the Working Group on Enforced or Involuntary Disappearances issued a joint urgent appeal concerning Mr. Sharma.

2.5 In November 2003, in response to the Supreme Court order, all public authorities denied any involvement in or awareness of the disappearance of Mr. Sharma. That same month, Ms. Sharma tried again to file a complaint regarding her husband's arrest and disappearance with the Kathmandu District Police Office, but the Office refused to register her complaint. On 3 November 2003, Ms. Sharma went to army headquarters to report her

[1] The authors refer to E/CN.4/2005/65/Add.1, paras. 7–9, 25 and 27, and Amnesty International (AI), Urgent Appeal, AI Index: ASA 31/03/2000 (February 2000), p. 2.

[2] The authors refer to Office of the United Nations High Commissioner for Human Rights, Nepal, "Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004" (May 2006).

husband's disappearance but was not allowed to enter the building and was threatened with arrest.

2.6 Mr. Sharma reports that he was detained incommunicado in the Bhairabnath Battalion barracks located in Maharajgunj. During the first 20 days of his detention, he did not receive any food. For the first month, he was detained in a small, windowless cell he could barely stand or sleep in. Subsequently, he was detained in a larger cell in poor sanitary condition and severely underfed. He was handcuffed and blindfolded at all times and not allowed to communicate with other detainees. Mr. Sharma was repeatedly subjected to torture and ill-treatment by the guards for the purpose of obtaining information on the Communist Party of Nepal (Maoist). That torture and ill-treatment took the form of beatings with plastic bars, flogging, simulated drownings, electric shocks and the insertion of thumbtacks through his nails. Mr. Sharma was interrogated and beaten up to 15 times a day at the beginning of his detention, then two or three times a day. He was repeatedly threatened with death and was therefore in a constant state of fear and anguish. One day, Mr. Sharma was forced to urinate on a high-voltage electric heater. He felt a shock and lost consciousness. No medical treatment was provided to him during his detention, and only after the shock to his genitals was he given painkillers. As a result of the severe ill-treatment he was subjected to, he suffers from permanent physical impairments and is sexually impotent; because of his excessive use of painkillers while he was undernourished, his right kidney is dysfunctional.

2.7 While he was detained and being subjected to interrogation, ill-treatment and torture, Mr. Sharma recognized several army officers who had been involved in his arrest.

2.8 One particular night in late December 2003, Mr. Sharma was told that he and some other detainees would be taken to an undisclosed location. They had been separated from the group, but shortly thereafter, he and a few others were sent back to the barracks. He later learned that the other detainees had been shot and buried in the jungle.

2.9 On 12 October 2004, the Terrorist and Disruptive Activities (Control and Punishment) Act was replaced by an ordinance of the same name extending the time that an individual could be kept in pretrial detention to a maximum of six months, renewable once. A new state of emergency was declared from 1 February to 5 May 2005, leading again to the suspension of the derogable rights of the Covenant.

2.10 On 4 February 2005, Mr. Sharma's lawyer filed a request to the Supreme Court to direct the National Human Rights Commission to conduct an investigation into his enforced disappearance. The Supreme Court ordered the investigation the same day.

2.11 In February 2005, Mr. Sharma was transferred to the Mahendradal Battalion barracks in Gorkha District. On 8 March 2005, the Nepalese Government eventually replied to the urgent appeal issued by the Special Rapporteur on torture and the Chair of the Working Group on Enforced or Involuntary Disappearances, claiming that Mr. Sharma had been "arrested on 14 February 2005 and was under preventive detention in Gorkha barracks".

2.12 Mr. Sharma remained in detention in the Mahendradal Battalion barracks and continued to be subjected to ill-treatment by the guards. On 20 and 28 March 2005, his wife and his lawyer were finally able to visit him.

2.13 On 19 May 2005, the National Human Rights Commission, following the Supreme Court's order to conduct an investigation into Mr. Sharma's disappearance, found that he had been in detention in the Mahendradal Battalion barracks in Gorkha since at least 25 March 2005 and that he had been subjected to severe mental and physical torture during his detention.

2.14 In August 2005, Mr. Sharma was taken to Birendra Military Hospital in Kathmandu, where, instead of receiving medical treatment, he was forced to sign documents while blindfolded. Immediately thereafter, he was transferred to the custody of the Jagadal Battalion of the First Brigade of the Royal Nepalese Army in Chhauni, where he was placed in custody for three days. On the first day he did not receive any food. When he complained, he was severely beaten. His right jaw was broken, and his eardrum was punctured. His eardrum is punctured to this day.

2.15 On 5 December 2005, the District Administration Office stated that Mr. Sharma was being detained under section 9 of the 2004 Terrorist and Disruptive Activities (Prevention and Punishment) Ordinance. He had initially been detained for a six-month period, which had been renewed in August 2005, since it was considered that he could still engage in terrorist activities. On 19 December 2005, Mr. Sharma was released following a 15 December 2005 order of the Supreme Court, which had found his detention unlawful. On the same day, as he was leaving the Court, Mr. Sharma was arrested again by several men in plain clothes. He and his wife were taken to the District Office police station. Ms. Sharma was subsequently released, but a warrant for terrorist activities was issued against Mr. Sharma, who remained in detention. On 5 February 2006, Mr. Sharma was formally charged with several terrorist offences by the Appellate Court and transferred to the Nakkhu jail in Kathmandu.

2.16 On 14 July 2006, Mr. Sharma was released and all charges against him were dropped as part of the negotiations conducted for the Comprehensive Peace Agreement, signed by the Government of Nepal and the Communist Party of Nepal (Maoist) on 21 November 2006. On 27 July 2006, Mr. Sharma, together with three fellow detainees who had also been released, filed a writ before the Supreme Court publicly disclosing relevant information about their capture, torture and disappearance and naming the main perpetrators. On 1 June 2007, the Supreme Court ruled on petitions submitted on behalf of 83 persons who had been disappeared, including the writ filed by Mr. Sharma. The Court issued a mandamus order directing the Government to criminalize enforced disappearance, to constitute a high-level commission of inquiry to look into the human rights violations committed in the Bhairabnath Battalion barracks in Maharajgunj and to provide the victims with appropriate reparations.

2.17 In addition to the Supreme Court ruling, both the Peace Agreement and the Interim Constitution of 2007 provide that the State party has a legal responsibility to investigate enforced disappearances and provide remedies to the victims and their families. However, no investigations have been initiated, and no criminal or disciplinary measures have been taken against anyone identified as responsible for the alleged acts of enforced disappearance and torture. On the contrary, since October 2008, the Government has had a policy of withdrawing criminal cases under clause 5 (2) (7) of the Peace Agreement, a policy that has led to the withdrawal of more than a thousand cases before the completion of criminal proceedings.

2.18 The Ministry of Peace and Reconstruction set up an interim relief programme in 2018. Mr. Sharma was able to benefit from the initiative only as a victim of conflict under the category "wounded and injured". He received interim relief of 100,000 rupees on 17 June 2011.[3] As awarding compensation for torture is not part of the programme's mandate, however, he was not compensated for the full extent of the ill-treatment he endured. The authorities still refuse to acknowledge his enforced disappearance from 21 October 2003 to 14 February 2005 in the barracks in Maharajgunj or to provide him with an official record of his situation during that period.

2.19 On 27 December 2009, Mr. Sharma and two former fellow detainees at the barracks in Maharajgunj submitted a petition to the Supreme Court contesting the promotion of Major General Toran Jung Bahadur Singh, who had been in command of officers responsible for enforced disappearances and torture occurring at the barracks.[4] On 19 October 2011, the Supreme Court ruled that the petition could not be considered on the merits, as Toran Jung Bahadur Singh had retired.

The complaint

3.1 The authors allege that the illegal arrest and detention of Mr. Sharma from 21 October 2003 to 8 March 2005 constitute an enforced disappearance and subsequently a

[3] Approximately $1,130.

[4] The authors refer to A/HRC/16/48, para. 352, and Office of the United Nations High Commissioner for Human Rights, Nepal, "Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004" (May 2006), p. 66.

violation by the State party of articles 6 (1), 7, 9 (1)–(4), 10 (1) and 16 of the Covenant. The authors contend that Mr. Sharma's case falls within an existing pattern of enforced disappearances perpetrated by security forces in the State party during the "people's war" and that, for this reason, the offence may be labelled as a crime against humanity that triggers an aggravated responsibility of the State.

3.2 Mr. Sharma did not die during his enforced disappearance from 21 October 2003 to 8 March 2005, but he was placed outside the protection of the law and exposed to grave dangers to his life.[5] The State party therefore violated article 6 (1) of the Covenant. The episode of late December 2003 (para. 2.8), illustrative of the widespread practice of arbitrary killing, plainly demonstrates the threat of death faced by Mr. Sharma.

3.3 The authors are of the view that enforced disappearance in and of itself constitutes an act of torture and a violation of article 7 of the Covenant.[6] They submit that the countless instances of torture and ill-treatment that Mr. Sharma was subjected to also constitute a violation of article 7. In addition, the authors allege that the overall conditions of detention were extremely poor and degrading and that the total absence of health care or assistance, even after torture sessions, are also a violation of article 7.

3.4 During his enforced disappearance, Mr. Sharma was not informed of the reasons for his detention and he was kept in detention without charges for a period well over the legal maximum at the time in Nepal (180 days and a further 180 days upon the approval of the Home Secretary). His detention was not registered in any official records, and his relatives and counsel were not informed of his whereabouts or allowed to visit him. He was never brought before a judge or any other official authorized by law. He had also been unable to challenge the lawfulness of his deprivation of liberty. The authors submit that the writ of habeas corpus submitted by Ms. Sharma on 29 October 2003 was ineffective, as it had elicited a response only two years later. The authors are of the view that these facts amount to a violation of article 9 (1)–(4) of the Covenant. From 8 March 2005 to 19 December 2005, immediately after his enforced disappearance, Mr. Sharma remained in detention. This detention, which was declared illegal by the Supreme Court of Nepal in its ruling of 15 December 2005, also amounted to a violation of article 9.

3.5 The authors consider that the extremely poor conditions of detention suffered by Mr. Sharma stripped him of his dignity, in violation of article 10 (1) of the Covenant.

3.6 The authors view the enforced disappearance as a failure to recognize Mr. Sharma as a person before the law, as the State refused to provide information about his fate or whereabouts, putting him outside the protection of the law. The authors thus contend that the State party violated Mr. Sharma's rights under article 16.

3.7 The authors argue that the authorities' ongoing failure to conduct an ex officio, prompt, impartial, independent investigation of Mr. Sharma's arbitrary detention, disappearance and torture in order to provide him with adequate remedies and prosecute and sanction the perpetrators also constitutes a violation of article 2 (3), read in conjunction with articles 6 (1), 7, 9 (1)–(4), 10 (1) and 16 of the Covenant.

3.8 The authors allege that Ms. Sharma was subjected to a violation of article 7 of the Covenant owing to the severe mental distress and anguish she experienced during the enforced disappearance of her husband and to the hostile attitude of the State party's authorities, which made her feel humiliated and abused. She still suffers from bouts of anxiety and insomnia and has occasional nervous breakdowns.

3.9 Ms. Sharma, seriously traumatized, had to bear the brunt of looking after and bringing up the couple's three young children. The enforced disappearance of her husband caused a grave disruption to her family life and was thus a violation of article 17 of the Covenant.

[5] The authors refer to *Guezout et al. v. Algeria* (CCPR/C/105/D/1753/2008).

[6] The authors refer to *Mojica v. Dominican Republic* (CCPR/C/51/D/449/1991), *Grioua and Grioua v. Algeria* (CCPR/C/90/D/1327/2004) and *Celis Laureano v. Peru* (CCPR/C/56/D/540/1993).

3.10 Ms. Sharma has been unable to claim any compensation or redress, as the domestic legal framework does not make it possible for her to do so. In view of the absence of an investigation and her inability to obtain compensation, she is a victim of a violation of her rights under article 7, on its own and read in conjunction with article 2 (3).

3.11 Regarding domestic remedies, Ms. Sharma submits that in view of the hostile attitude of the national authorities that she faced after she had filed a writ of habeas corpus with the Supreme Court (paras. 2.4 and 2.5), she considered it useless, if not dangerous, to file a complaint with the police regarding the intimidation and threats of arrest that she faced. As she was not considered a victim for the purposes of the Interim Relief Programme, she could not benefit from it.

3.12 The authors further contend that no effective domestic remedy was available to them. The 1996 Compensation Relating to Torture Act provides only for compensation, not for criminal accountability, and it contains a 35-day term of limitation. As Mr. Sharma was immediately rearrested after he was first released on 19 December 2005, he did not have a chance to submit a complaint regarding the torture he had suffered from October 2003 to March 2005. In any case, a civil court is unable to pursue an independent investigation or make any meaningful findings regarding the responsibility of perpetrators for such serious crimes. In addition, the State never implemented the provisions of the Peace Agreement, the Interim Constitution or the ruling of the Supreme Court of 1 June 2007, all requiring that enforced disappearances should be investigated and that victims be provided with a remedy.

3.13 On 14 March 2013, the President of Nepal adopted the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance, 2069 (2012). In practice, the commission is not yet operational, and the authors contend that it cannot be considered an effective remedy, as it has the power only to refer cases for prosecution to the Attorney General, who is appointed by the Government and is thus not an independent authority. In addition, the commission has been granted discretion to recommend amnesty for perpetrators of human rights violations when it is of the view that it would be "reasonable" to do so.

3.14 The authors waited for the authorities to follow through on their commitment to transitional justice until it became clear to them that no effective remedy would be provided. To this day, the very fact of the author's enforced disappearance between October 2003 and March 2005 is still being denied by the State authorities.

3.15 The authors request the Committee to recommend to the State party that it: (a) bring the perpetrators of Mr. Sharma's arbitrary deprivation of liberty, torture and enforced disappearance before the competent civilian authorities for prosecution, judgment and sanction, and disseminate publicly the results of those measures; (b) suspend from service all army personnel against whom there is prima facie evidence of involvement in the crimes against Mr. Sharma, pending the outcome of the investigation; (c) amend the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance adopted on 14 March 2013 to ensure that no one accused of gross human rights violations, including torture, enforced disappearance and arbitrary killing, may benefit from any amnesty provision exempting him or her from criminal responsibility; (d) ensure that persons suspected of having committed those crimes are not in a position to influence the progress of the investigation by means of pressure, acts of intimidation or reprisal against complainants, witnesses, their families, their lawyers or other persons participating in the investigation; (e) ensure that the authors obtain integral reparation and prompt, fair and adequate compensation; (f) ensure that the measures of reparation cover material and moral damages; and (g) adopt measures providing for restitution, rehabilitation, satisfaction and guarantees of non-repetition. In particular, they request that the State party acknowledge its international responsibility in a public ceremony held in the presence of the authorities and the authors, to whom official apologies should be issued. The State party should also provide the authors with medical and psychological care immediately and free of charge, through its specialized institutions, and grant them access to free legal aid where necessary, in order to provide them with effective and sufficient remedies. As a guarantee of non-repetition, the State party should take the necessary measures to ensure that enforced disappearance and torture, and the different forms of participation in those crimes,

constitute autonomous offences in its criminal law and that they are punishable by penalties that take into account their extreme seriousness. Finally, the State party should establish as soon as possible educational programmes on international human rights law and international humanitarian law for all members of the army, the security forces and the judiciary.

State party's observations on admissibility

4.1 In a note verbale dated 10 September 2013, the State party submitted its observations, challenging the admissibility of the communication on the grounds that the alleged violations had not been substantiated and that domestic remedies had not been exhausted.

4.2 The State party maintains that the authors' allegations concerning the circumstances in which the alleged arrest and detention of Mr. Sharma took place are not supported by any direct or circumstantial evidence. Mr. Sharma was arrested under section 9 of the 2004 Terrorist and Disruptive Activities (Control and Punishment) Ordinance following a detention order duly delivered to him. This order was extended for another six months on 17 August 2005. Mr. Sharma was detained in army barracks, where he was treated humanely. He was provided with medical care at Birendra Military Hospital. He was visited by his parents and relatives and by a representative of the Office of the United Nations High Commissioner for Human Rights (OHCHR), whose visit was recorded officially. Allegations that Mr. Sharma was subjected to enforced disappearance are thus unsubstantiated and false. The State party notes that the state of emergency was in force at the time of Mr. Sharma's arrest and detention.

4.3 Arbitrary detention and torture are criminalized and prohibited by the Interim Constitution of 2007. The 1996 Compensation Relating to Torture Act provides a mechanism for claiming compensation in the event of torture. This is an effective remedy that the authors chose not to avail themselves of within the required time frame (no more than 35 days after having suffered torture). Neither have the authors filed a first information report with the police regarding the injuries Mr. Sharma claims he has suffered. Ms. Sharma was never arrested, detained, harassed or tortured by public officials.

4.4 Nepal is committed to addressing the human rights violations that were committed during the armed conflict. To address that situation, it has decided to establish a commission to investigate cases of disappearances and to establish a truth and reconciliation commission, in compliance with the Interim Constitution. To this end, the Government of Nepal has promulgated the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance, 2069 (2012). The commission may recommend that the Attorney General bring proceedings against a perpetrator or that the Government formulate necessary laws to ensure prosecutions. The commission can recommend reparations. Once the commission is constituted, conflict-era cases will be effectively addressed by the transitional justice mechanism, and once the commission submits a report, it will be possible to institute judicial proceedings against the perpetrators of serious human rights violations in a court of law.

4.5 Mr. Sharma has already received 100,000 rupees as interim relief. The authors could be entitled to reparation, depending on the outcome of the investigation, once the transitional justice mechanism is established. Accordingly, the authors have not exhausted domestic remedies.

Authors' comments on the State party's observations on admissibility

5.1 On 14 October 2013 and 10 January 2014, the authors submitted their comments on the State party's observations. The authors note the State party's contention that their allegations are false and stress that the State does not substantiate these accusations.

5.2 The authors argue that, while torture and ill-treatment are prohibited by the Interim Constitution, these acts are not appropriately defined by the law, and there is no criminal sanction attached to them. Furthermore, the Compensation Relating to Torture Act does not constitute an effective remedy for the authors because Mr. Sharma, who had been subjected to enforced disappearance starting on 21 October 2003 and had been rearrested on 19 December 2005, could not have met its 35-day statutory limitation for filing a complaint. The authors add that this time limitation is not in line with international

standards. The authors further argue that, according to the jurisprudence of the Committee, administrative, disciplinary or civil remedies are not adequate to address crimes of such seriousness as torture and enforced disappearance.[7]

5.3 In relation to not having filed a first information report, the authors note that torture and enforced disappearance are not crimes that can be reported under this remedy, as such reports are limited to the crimes listed in schedule 1 of the State Cases Act of 1992, which does not include torture. They submit that they cannot be expected to report crimes different from the ones they were subjected to. Furthermore, the police refused to register the first information report Ms. Sharma tried to submit (paras. 2.4 and 2.5). The authors note that the Committee has considered that the first information report is not an effective remedy for the purposes of article 5 (2) of the Optional Protocol.[8] They further consider that the State party recognized that they could not have used either of these two remedies when it stated that judicial proceedings against the perpetrators of human rights violations could be initiated in a court of law once the truth commission submitted a report.

5.4 The authors also note that, although they were unable to file a first information report or a complaint, they have taken other steps to seek justice (see paras. 2.16 and 2.19). The State, however, has failed to explain why it has not pursued an ex officio investigation.

5.5 The authors informed the Committee that on 2 January 2014, the Supreme Court of Nepal had declared the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance, 2069 (2012), of 14 March 2013 unconstitutional. The Court had ordered the Nepalese authorities to establish a new commission without delay. Furthermore, fact-finding processes by non-judicial bodies, although crucial for the establishment of the truth, could never replace access to justice and redress for victims of gross human rights violations, as the criminal justice system was the more appropriate avenue for the immediate investigation into and punishment of criminal acts. Accordingly, the prospective commission could not be considered an effective remedy to be exhausted by the authors.

5.6 The authors note that, notwithstanding the State party's claim to the contrary, they have submitted a number of documents in support of their allegations. Their allegations were confirmed by a former fellow detainee of Mr. Sharma's, Mr. Jit Man Basnet, in his testimony before the National Human Rights Commission. A report by the Nepal office of OHCHR (OHCHR–Nepal) expressly names Mr. Sharma as one of the prisoners detained from late November to mid-December 2003.[9] The authors also attached a picture portraying Mr. Sharma with a tyre forced around him by army personnel. They also contend that the way in which the writ of habeas corpus was processed demonstrates that his detention was denied and concealed by the authorities. Since an enforced disappearance is characterized by deprivation of liberty and the State's refusal to acknowledge it, the authors maintain that Mr. Sharma was subjected to arbitrary arrest and enforced disappearance. These allegations fit in the context of the widespread use of torture and enforced disappearance against members of the Maoist-affiliated All Nepal National Independent Student Union (Revolutionary). Finally, the authors argue that, as supported by the jurisprudence of the Committee, the burden of proof in this regard cannot rest solely on the authors.[10]

5.7 The authors deny the State party's claim that a detention order was handed to Mr. Sharma prior to his arrest in February 2005 and maintain that he was first subjected to enforced disappearance and then arbitrarily detained from 8 March 2005 to 19 December 2005. The authors contend that the fact that a detention is not a violation of domestic law does not imply that it complies with international human rights law. In this case, Mr. Sharma was not charged with any crime during these two periods; he was never given an opportunity to challenge the legality of his detention, and the writ of habeas corpus that Ms. Sharma initiated on 29 October 2003 did not lead to his release until 19 December 2005.

[7] The authors refer to *Benaziza et al. v. Algeria* (CCPR/C/99/D/1588/2007), para. 8.3, among others.

[8] The authors refer to *Sharma and Prasad Sharma v. Nepal* (CCPR/C/94/D/1469/2006), para. 6.3.

[9] "Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004" (May 2006), p. 52.

[10] The authors refer to *Sharma and Prasad Sharma v. Nepal* (CCPR/C/94/D/1469/2006), para. 7.5.

5.8 The authors assert that they have alleged not that Ms. Sharma was arrested, detained, harassed or tortured but that she suffered trauma, anguish and stress owing to her husband's disappearance.

State party's observations on the merits

6.1 In its observations dated 5 March 2014, the State party submits that the authors failed to provide evidence of the arbitrariness of Mr. Sharma's detention. It reiterates that a detention order was duly delivered and that Mr. Sharma was treated humanely during his detention. It is noted that the state of emergency was declared on 26 February 2001, in conformity with the Covenant. Mr. Sharma's detention was in accordance with the prevailing law in Nepal and was not an enforced disappearance.

6.2 The State party contends that the authors have not been able to provide evidence of the allegations of torture and rejects the assertions of the Special Rapporteur on torture and the Working Group on Enforced or Involuntary Disappearances that torture was systematically practiced by the police and the army. If Mr. Sharma had been a victim of torture, he would have sought a remedy under the Compensation Relating to Torture Act or lodged a petition with the National Human Rights Commission, which is an independent and autonomous body established in conformity with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). There are no statutory limitations on bringing cases of torture to the Commission.

6.3 The State party maintains that it is committed to establishing a transitional justice mechanism. The Government of Nepal promulgated the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance, but on 2 January 2014 the Supreme Court ordered the Government not to implement it and to amend it to bring it into line with the Constitution and the principles of justice. The process will be continued by the newly elected Constituent Assembly. The State party is of the view that it would be inappropriate for the Committee to continue considering the communication, as the Committee's communication mechanism is meant to complement domestic mechanisms, not to supplant them. The difficult context of Nepal should be taken into consideration when assessing the progress it had made towards the establishment of a transitional justice mechanism. The Government is currently drafting bills to criminalize torture and enforced disappearance.

6.4 The authors, according to the State party, have failed to exhaust domestic remedies, and the matter at hand can be addressed through the transitional justice mechanism.

Authors' comments on the State party's observations on the merits

7.1 On 10 April 2014, the authors submitted their comments on the State party's observations on the merits. Regarding the non-exhaustion of domestic remedies, they reiterate their arguments presented on 14 October 2013.

7.2 In their comments, the authors note that the State party does not challenge the allegations concerning the violations suffered by Ms. Sharma and that it seems to acknowledge that she is a victim of a violation of her rights under article 7, read alone and in conjunction with articles 2 (3) and 17.

7.3 The authors reiterate that Mr. Sharma was subjected to an enforced disappearance (paras. 5.6 and 5.7). Furthermore, as he was deprived of liberty on 21 October 2003, this deprivation of liberty could not have been in compliance with the Terrorist and Disruptive Activities (Control and Punishment) Ordinance, which was adopted only in 2004. He was never provided with a detention order, and the State party has failed to provide any evidence of any such document. The arbitrariness of Mr. Sharma's detention was confirmed by the Supreme Court of Nepal on 19 December 2005.

7.4 The authors note that, although Mr. Sharma was taken to Birendra Military Hospital, he did not obtain any treatment or assistance and that he suffers from permanent health impairments.

7.5 The authors reiterate that Mr. Sharma was subjected to torture and ill-treatment and that the State party has not been able to refute those allegations. They note that they have provided a picture taken after a torture session as a piece of evidence and that the State party has not challenged the fact that Mr. Sharma was detained incommunicado for 17

months. The authors emphasize that there is a direct link between incommunicado detention and ill-treatment and that prolonged incommunicado detention can itself amount to torture, as recognized in treaty body jurisprudence.[11]

7.6 The authors note that the Special Rapporteur on torture, the Working Group on Enforced or Involuntary Disappearances and the Committee against Torture have acknowledged that the practice of torture in Nepal is widespread and systematic.[12] They also note that the 35-day limit for bringing claims under the Compensation Relating to Torture Act has been found by the Human Rights Committee to be "flagrantly inconsistent with the gravity of the crime".[13]

7.7 Mr. Sharma has received interim relief, a provisional measure that does not amount to fair and adequate compensation for the harm he suffered as a result of the grave violations of his human rights. Nor does interim relief amount to reparation, rehabilitation, satisfaction, restitution or a guarantee of non-repetition. His case is not an exception in Nepal, as the Committee has noted.[14]

7.8 The authors confirm that their case has been submitted to the National Human Rights Commission but that the submission did not enable them to access justice or obtain redress. Moreover, the National Human Rights Commission, in the Committee's view,[15] should not be considered a judicial remedy.

7.9 The authors reiterate that the transitional justice mechanism is still non-existent and that they cannot be asked to exhaust a remedy that, because it does not exist, cannot be exhausted. The authors believe that it has been long enough since the events in question for the State party to have provided them with justice and redress.

Further submissions from the State party

8. In notes verbales dated 24 June 2014 August and 11 December 2014, the State party informed the Committee that the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014), had been adopted by Parliament in April 2014 and that the truth and reconciliation commission and the enforced disappearance commission would be established shortly. It provided a brief description of the main provisions of the Act and held that it was a landmark instrument to address the issue of past human rights violations committed by both State and non-State actors. It also submitted that the bills to criminalize torture and enforced disappearance had been drafted and were in the process of resubmission to Parliament. The criminal justice system could not provide full remedy to the victims of the armed conflict without the transitional justice mechanisms. The authors' claims would therefore be addressed fully after the establishment of those mechanisms.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether the communication is admissible under the Optional Protocol.

9.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's arguments that the authors have not exhausted domestic remedies, as

[11] The authors refer to *G.K. v. Switzerland* (CAT/C/30/D/219/2002), para. 6.3, and *Sedhai et al. v. Nepal* (CCPR/C/108/D/1865/2009), para. 8.3.

[12] The authors refer to *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 44* (A/67/44 (2012), annex XIII.

[13] The authors refer to *Maharjan et al. v. Nepal* (CCPR/C/105/D/1863/2009), para. 7.6.

[14] See CCPR/C/NPL/CO/2, para. 5 (b).

[15] The authors refer to *Giri et al. v. Nepal* (CCPR/C/101/D/1761/2008), para. 6.3.

they have failed to register a first information report with the police or lodge a complaint under the 1996 Compensation Relating to Torture Act, and that the case should be addressed by the transitional justice mechanisms established in conformity with the Interim Constitution of 2007. The Committee also notes the authors' arguments that, because such reports are filed only for the crimes listed in schedule 1 of the State Cases Act of 1992, which does not include enforced disappearance or torture, filing a first information report is not an appropriate means of seeking a remedy, that the Compensation Relating to Torture Act does not provide for criminal accountability, that statutory limitations prevented the authors from availing themselves of the mechanism established under the Act and that transitional justice mechanisms do not replace access to justice and cannot be considered an effective remedy to be exhausted. The Committee observes that Ms. Sharma attempted to file a complaint with the Kathmandu District Police Office but that the latter refused to register it. The Committee further notes that on 29 October 2003, Ms. Sharma filed a writ of habeas corpus before the Supreme Court that did not shed light on her husband's whereabouts. On 4 February 2005, Mr. Sharma's lawyer also submitted a petition to the Supreme Court, requesting an investigation into his client's disappearance. In its jurisprudence, the Committee has expressed the view that in cases of serious human rights violations such as torture or enforced disappearance, a judicial remedy is required.[16] In this respect, the Committee observes that the transitional justice bodies established by the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014), are not judicial organs.[17] With regard to the remedy under the Compensation Relating to Torture Act 1996, the Committee observes that, in accordance with article 5, paragraph 1, of the Act, claims for compensation must be submitted within 35 days of the occurrence of torture or the detainee's release. The Committee considers that, because of the 35-day period of limitation for bringing claims of torture under the Act, a period whose brevity is flagrantly inconsistent with the gravity of the crime, this remedy was not available to the authors.[18] The Committee also notes that the authors have made several fruitless attempts to report the violations of their rights, including to the Supreme Court. Accordingly, the Committee considers that the authors have exhausted all available domestic remedies and that there are no obstacles to the examination of the communication under article 5 (2) (b) of the Optional Protocol.

9.4 The Committee notes the State party's observations that the authors' allegations have not been substantiated. For the purposes of admissibility, however, the Committee considers that the authors have sufficiently substantiated their allegations with plausible supporting arguments. As all admissibility requirements have been met, the Committee declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

10.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

10.2 The Committee takes note of the authors' allegations that Mr. Sharma was subjected to an enforced disappearance from 21 October 2003 to 8 March 2005. The Committee also notes the State party's argument that the authors' allegations have not been substantiated and that Mr. Sharma was arrested only on 14 February 2005, under section 9 of the Terrorist and Disruptive Activities (Control and Punishment) Ordinance.

10.3 The Committee notes that it has dealt with numerous similar cases, some of them involving the State party. In line with these precedents, the Committee reaffirms that the burden of proof cannot rest solely on the authors of the communication, especially considering that the authors and the State party do not always have equal access to evidence and that frequently the State party alone has access to the relevant information.[19] It is

[16] See *Giri et al. v. Nepal* (CCPR/C/101/D/1761/2008), para. 6.3.

[17] See *Tharu et al. v. Nepal* (CCPR/C/114/D/2038/2011), para. 9.3.

[18] See *Maharjan et al. v. Nepal* (CCPR/C/105/D/1863/2009), para. 7.6.

[19] See *El Hassy and El Hassy v. Libyan Arab Jamahiriya* (CCPR/C/91/D/1422/2005), para. 6.7; *Medjnoune v. Algeria* (CCPR/C/87/D/1297/2004), para. 8.3; *Il Khwildy and Il Khwildy v. Libya* (CCPR/C/106/D/1804/2008), para. 7.2; and *Tripathi et al. v. Nepal* (CCPR/C/112/D/2111/2011), para. 7.2.

implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives, and to provide the Committee with the information available to it. In cases where the author has submitted allegations to the State party that are corroborated by credible evidence, and where further clarification depends on information that is in the hands of the State party alone, the Committee may, in the absence of satisfactory evidence or explanations to the contrary presented by the State party, consider the author's allegations substantiated.

10.4 In the present case, the Committee notes the authors' allegations that Mr. Sharma was arrested without a warrant on 21 October 2003, held incommunicado in the Bhairabnath Battalion barracks located in Maharajgunj and not brought before a judge or any other official authorized by law to exercise judicial power; nor could he take proceedings before a court to challenge the lawfulness of his detention until 15 December 2005, when the Supreme Court ruled that his detention was unlawful. The Committee observes that shortly after losing contact with her husband in October 2003, Ms. Sharma approached the Kathmandu District Police Office searching for him and that she filed a writ of habeas corpus on 29 October 2003. In this regard, the Committee observes that a report by OHCHR–Nepal names Mr. Sharma as one of the prisoners in detention from late November to mid-December 2003.[20] The Committee also notes that in the context of the habeas corpus proceedings before the Supreme Court, all authorities denied that he had ever been detained by the police. Only on 8 March 2005 did the authorities, acknowledging that he had been detained since 14 February 2015, reveal Mr. Sharma's whereabouts. The Committee notes the State party's assertion that Mr. Sharma was not arrested until 14 February 2005 and that he was provided with a detention order. However, the State party has produced no evidence of the whereabouts of Mr. Sharma prior to 14 February 2005 or of the detention order. The Committee is therefore considers that the deprivation of liberty of Mr. Sharma, followed by the authorities' refusal to acknowledge it and the concealment of his fate, constituted an enforced disappearance.

10.5 The Committee notes that, while the Covenant does not explicitly use the term "enforced disappearance" in any of its articles, enforced disappearance constitutes a unique and integrated series of acts that represent a continuing violation of various rights recognized in that treaty.[21]

10.6 The Committee recalls that, in cases of enforced disappearance, the act of deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, places the person outside the protection of the law and puts his or her life at serious and constant risk, for which the State is accountable.[22] In the present case, the State party has produced no evidence to show that, from 21 October 2003 to 8 March 2005, it met its obligations to protect the life of Mr. Sharma. Accordingly, the Committee concludes that the State party failed in its duty to protect Mr. Sharma's life, in violation of article 6 (1) of the Covenant.[23]

10.7 The Committee takes note of the authors' allegations that the detention and subsequent enforced disappearance of Mr. Sharma amount per se to treatment contrary to article 7. The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. In general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, the Committee recommends that States parties make provisions to ban incommunicado detention. It notes that, in the present case, Mr. Sharma was held incommunicado between 21 October 2003 and 8 March 2005. It also notes the authors' allegations that Mr. Sharma was tortured, in particular during the first 20 days of his detention in the Maharajgunj barracks, and that the authors provided photographic evidence of their claims. He suffered permanent physical damage. In the absence of a satisfactory explanation from the State

[20] "Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004" (May 2006), p. 52.

[21] *Katwal and Katwal v. Nepal* (CCPR/C/113/D/2000/2010), para. 11.3; and *Serna et al. v. Colombia* (CCPR/C/114/D/2134/2012), para. 9.4.

[22] *Abushaala et al. v. Libya* (CCPR/C/107/D/1913/2009), para. 6.2.

[23] *Il Khwildy and Il Khwildy v. Libya* (CCPR/C/106/D/1804/2008), para. 7.12.

party in that regard, the Committee finds that the enforced disappearance of Mr. Sharma and the acts of torture he was subjected to thereafter constitute a violation of article 7 of the Covenant. Having reached that conclusion, the Committee will not examine the authors' claims, which are based on the same facts, regarding the alleged violation of article 10 (1).

10.8 The Committee considers that the enforced disappearance that Mr. Sharma was subjected to constitutes a violation of his rights under article 9 of the Covenant.

10.9 The Committee is of the view that the intentional removal of a person from the protection of the law constitutes a refusal to recognize that person as a person before the law, in particular if the efforts of his or her relatives to obtain access to effective remedies have been systematically impeded.[24] The Committee therefore finds that the enforced disappearance of Mr. Sharma deprived him of the protection of the law and of his right to recognition as person before the law, in violation of article 16 of the Covenant.

10.10 The Committee notes the anguish and distress caused to Ms. Sharma by the disappearance of her husband from the time of his arrest to 8 March 2005, when the authorities confirmed his whereabouts. The Committee observes that, during that period, Ms. Sharma had to look after and bring up their three young children alone. It also observes that, soon after Mr. Sharma disappeared, Ms. Sharma made several attempts to establish her husband's whereabouts and that she was treated in a hostile manner by the authorities, who officially denied the detention. The Committee notes that the State party denied that the authorities had arrested, detained, tortured or harassed Ms. Sharma but also that the authors never alleged that she had suffered this kind of treatment. The Committee also notes that the State party has not refuted the allegations that Ms. Sharma was treated with hostility by the authorities or contested her claims about the anguish and distress caused by the disappearance of her husband. In the particular circumstances of the present case, the Committee therefore considers that the facts before it also disclose a violation of article 7 of the Covenant with regard to Ms. Sharma.[25] In the light of the above findings, the Committee will not examine separately the authors' allegations concerning the violation of their rights under article 17.[26]

10.11 As to the authors' allegations under article 2 (3) of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose rights under the Covenant have been violated, the Committee notes that it attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of human rights violations. In general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, the Committee states that failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the present case, the Committee observes that Mr. Sharma did not have access to an effective remedy while in detention or after his release. During her husband's detention, Ms. Sharma approached a police station seeking information. She later filed a writ of habeas corpus before the Supreme Court and complained to the National Human Rights Commission. The authors' efforts, the Commission's recommendations to investigate and the Supreme Court's mandamus order directing the Government to initiate an investigation into the circumstances of Mr. Sharma's detention and enforced disappearance and provide appropriate reparations have all been to no avail. It has been more than 11 years since Mr. Sharma was first detained, but no thorough and effective investigation into the circumstances surrounding Mr. Sharma's detention and enforced disappearance has been carried out by the State party, and no criminal investigation to bring the perpetrators of the crimes he was a victim of to justice has been launched. The payment of 100,000 rupees that he received as interim relief is not a remedy commensurate with the serious rights violations he and his wife endured. Accordingly, the Committee concludes that, in respect of Mr. Sharma, the facts before it disclose a violation of article 2 (3), read in conjunction

[24] See *Basnet and Nepali v. Nepal* (CCPR/C/117/D/2164/2012), para. 10.9; and *Tharu et al. v. Nepal* (CCPR/C/114/D/2038/2011), para. 10.9.

[25] See *El Abani (El Ouerfeli) et al. v. Libyan Arab Jamahiriya* (CCPR/C/99/D/1640/2007), para. 7.5.

[26] See *Mandić v. Bosnia and Herzegovina* (CCPR/C/115/D/2064/2011), para. 8.6.

with articles 6 (1), 7, 9 and 16, and, in respect of Ms. Sharma, a violation of article 2 (3), read in conjunction with article 7.

11. The Committee, acting under article 5 (4), of the Optional Protocol, is of the view that, in respect of Mr. Sharma, the information before it discloses a violation by the State party of articles 6, 7, 9 and 16 of the Covenant, read alone and in conjunction with article 2 (3), and, in respect of Ms. Sharma, a violation of article 7, read alone and in conjunction with article 2 (3).

12. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to, inter alia: (a) conduct a thorough and effective investigation into the facts surrounding the detention of Mr. Sharma and the treatment he suffered in detention; (b) prosecute, try and punish those responsible for the violations committed and make the results of such measures public; (c) provide the authors with detailed information about the results of its investigation; (d) ensure that any necessary and adequate psychological rehabilitation and medical treatment is provided to the authors; and (e) provide effective reparation, including adequate compensation and appropriate measures of satisfaction, to the authors for the violations suffered. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In particular, the State party should ensure that its legislation: (a) allows for the criminal prosecution of those responsible for serious human rights violations, such as torture, extrajudicial execution and enforced disappearance; (b) guarantees that any enforced disappearances give rise to a prompt, impartial and effective investigation; (c) defines and criminalizes acts of torture with sanctions and remedies commensurate with the gravity of the crime; and (d) is amended to bring the 35-day limit for claiming compensation for torture into line with international standards.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.